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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91215657
Party	Plaintiff Goya Foods, Inc.
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Attachments	GOYOGO Motion to Strike.pdf(32592 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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----------X Goya Foods, Inc.,	Opposition No. 91215657
Opposer,	Mark:  Serial No. 86060111
v.	Mark: GOYOGO FROZEN YOGURT OUR INGREDIENTS YOUR CREATION
GOYOGO FROZEN YOGURT LLC, Applicant, ----------X	Serial No. 86037364

OPPOSER'S MOTION TO STRIKE APPLICANT'S FIRST, SIXTH, AND SEVENTH AFFIRMATIVE/SEPARATE DEFENSES FROM APPLICANT'S ANSWER TO THE NOTICE OF OPPOSITION

Opposer, Goya Foods, Inc. ("Opposer") by its attorneys, Baker and Rannells, PA, hereby moves to strike several separate defenses of Applicant, GOYOGO FROZEN YOGURT LLC ("Applicant"), as pled in its Answer to Opposer's Notice of Opposition. As will be discussed in greater detail herein, the alleged defenses do not provide Applicant with legally sufficient or supported defenses to the Notice of Opposition.

This motion is timely made within the time prescribed in Fed. R. Civ. P. 12(c). Insofar as the motion falls under Fed. R. Civ. P. 12(f), the board has discretion to hear the same at this time. And, to the extent the motion requires the Board to look beyond the pleadings, the motion may be considered a motion for partial summary judgment pursuant to Fed. R. Civ. P. 56(c).

Granting the instant motion would be helpful in narrowing and limiting the issues in this proceeding and thereby also serving as a guide in conducting discovery. As stated in 2A Moore's Federal Practice paragraph 12.21[3]:

> "Although courts are reluctant to grant motions to strike, where a defense is legally insufficient, the motion should be granted in order to save the parties unnecessary expenditure in time and money in preparing for trial."

See id. Opposer's grounds for this motion are set forth below.

Applicant's First Affirmative/Separate Defense Should Be Stricken

A motion to strike the defense of failure to state a claim upon which a relief can granted may be used by a movant to test the sufficiency of a pleading. *See, e.g., Rooibos Limited v. Forever Young (Pty) Limited and Virginia Burke-Watkins*, 2003 TTAB LEXIS 65 at* 11-12 (TTAB 2003). Accordingly, in determining whether to strike an affirmative defense, it will be necessary to look at the sufficiency of the Applicant's pleading. *See id.*

The First Affirmative Defense should be stricken in its entirety. The affirmative defense is as follows:

FIRST AFFIRMATIVE/SEPARATE DEFENSE

Goya fails to state a cause of action for which relief can be granted.

At the pleading stage, Opposer must allege facts in its Notice of Opposition demonstrating its real interest in the proceeding. Those facts must thereafter be proven by Opposer as part of its case. *See, Ritchie v. Simpson*, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999).

To plead a real interest, a plaintiff must allege a "direct and personal stake" in the outcome of the proceeding. *See id.* at 1026. The allegations in support of the plaintiff's belief of damage must have a reasonable basis "in fact." *Id.* at 1927 (citing *Universal Oil Products. v. Rexall Drug*

& Chemical Co., 463 F.2d 1122, 174 USPQ 458-459-60 (CCPA 1972) and stating that the belief of damage alleged by plaintiff must be more than a subjective belief).

Applicant's asserted defense questions the sufficiency of Opposer's pleading. While Rule 12(b) permits Applicant to assert the above defense, "it necessarily follows that a plaintiff may utilize this assertion to test the sufficiency of the defense in advance of trial by moving . . . to strike the 'defense' from the defendant's answer." *See Order of Sons of Italy in America v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1222-1223 (TTAB 1995), (citing *S.C. Johnson & Son Inc. v. GAF Corporation*, 177 USPQ 720 (TTAB 1973)).

The following factors set forth in *Sons of Italy* govern a motion to strike a defense of failure to state a claim upon which relief may be granted:

> "1. To withstand a motion to dismiss for failure to state a claim upon which relief can be granted, an Opposer need only allege such facts as would, if proved, establish that (1) the Opposer has standing to maintain the proceeding, and (2) a valid ground exists for opposing registration.
>
> "2. For purposes of determining a motion to dismiss for failure to state a claim upon which relief can be granted, all of Opposer's well-pleaded allegations must be accepted as true, and the Notice of Opposition must be construed in the light most favorable to Opposer.
>
> "3. Dismissal for insufficiency is appropriate only if it appears certain that the Opposer is entitled to no relief under any set of facts which could be proved in support of its claim.
>
> "4. The standing question is an initial inquiry directed solely to establishing the personal interest of the plaintiff. An Opposer need only show 'a personal interest in the outcome of the case beyond that of the general public.'"

See id.

In its Notice of Opposition, Opposer has established its standing and thus the sufficiency of its standing, and has alleged, inter alia, the following:

- Opposer believes that allowing applicant Ser. Nos 8606011 and 86037364 for GOYOGO FROZEN YORGURT OUR INGREDIENTS YOUR CREATION (both word mark and design mark), to proceed to registration will cause Opposer damage (Not. Opp. ¶1)
- Opposer is now and for many years has been trading as and known by the Opposer's Mark and trade name identifying Opposer as the source of a wide variety of goods, including foods and beverages, which are substantially identical to and generally related to Applicant's Services. (Not. Opp. ¶6)
- Opposer is now and for many years prior to any date which may be claimed by Applicant, engaged in the use of Opposer's Mark and trade name on and in association with Opposer's Goods and Services, including *inter alia*, those identified above in paragraph 5 and below in paragraph 10. (Not. Opp. ¶8)
- The use by Opposer of the Opposer's Marks for the Opposer's Goods and Services alleged herein is long prior to any date which may be lawfully claimed by Applicant, and Opposer has priority. (Not. Opp. ¶10[12])
- Applicant's Mark is confusingly similar to Opposer's Marks. (Not. Opp. ¶15)
- The goods of Applicant and Opposer are substantially identical in part, and related in part, and Applicant's intended use of Applicant's Mark in connection with Applicant's Services is without the consent or permission of Opposer. (Not. Opp. ¶17)
- The registration of Applicant's Mark to Applicant will cause the relevant purchasing public to enoneously assume and thus be confused, misled, or deceived, that Applicant's Goods are made by, licensed by, controlled by, sponsored by, or in some way connected, related or associated with Opposer, all to Opposer's irreparable damage. (Not. Opp. ¶20)

The foregoing allegations are specifically set forth in Opposer's pleading and, if proven, establish standing and thereby shows Opposer's entitlement to relief. Applicant's first defense is insupportable as a matter of law, and thus should be stricken.

Applicant's Sixth Separate Defense Should Be Stricken

The Sixth Separate Defense should be stricken in its entirety. The specific Paragraphs are as follows:

SIXTH AFFIRMATIVE/SEPARATE DEFENSE

The Products sold under the GoYoGo marks are sold in Channels of Commerce different from the Goya Marks.

Applicant's Sixth Separate Defense in its Answer appear to allege that the services provided under Applicant's Marks travel through different channels of trade and/or are directed at different types of ultimate consumers than those targeted by Opposer's trademarks. Such defense is unintelligible and do not present an adequate defense and therefore should be stricken. Applicant's applications are for "Self-service frozen yogurt shop services." The description services is not limited in any fashion and on that basis it is presumed that Applicant's yogurt offered by its services travel or may travel in all channels of distribution and may be marketed to all people. Likewise, Opposer's Marks have no limitation and on that basis, the channels of distribution and marketing are the deemed same or similar. As such, the Applicant's sixth separate defense should be stricken.

Applicant's Seventh Separate Defense Should Be Stricken

The Seventh Separate Defense should be stricken in its entirety. The specific Paragraphs are as follows:

SEVENTH SEPARATE DEFENSE

The GoYoGo mark have been and continue to be used in Commerce.

Here, claiming that the Applicant's marks have been and continue to be used in Commerce is not a defense.

WHEREFORE, Opposer respectfully moves that its motion strike the First, Sixth and Seventh Affirmative Defense and Counterclaims of Applicant's Answer be granted in all respect and/or that its time to file an answer to the Counterclaim is extended and reset.

Dated: June 2, 2014

Respectfully submitted,
Baker and Rannells, PA

By:/Pei-Lun Chang/_____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was forwarded by first class postage prepaid mail by depositing the same with the U.S. Postal Service on this __2nd_ day of June, 2014 to counsel for Applicant at the following address:

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_____

/Pei-Lun Chang/

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